MA JUNXIANG v. MAYLAND VENUE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
SU TIANG JOO J
[CASE NOS: WA-22NCvC-255-04-2019
& WA-22NCvC-259-04-2019]
16 APRIL 2024

Abstract – *(i) It would not be commercially viable for a developer to proceed with stratified development when there is only one purchaser who bought property within the development phase. The sole purchaser would have to bear the costs for the maintenance and management of all the common property and common facilities; (ii) It behoves an advocate and solicitor acting for a housing developer to ensure that any certificate, signed by a purchaser saying he does not intend to engage an advocate and solicitor to scrutinise the agreement for him, is signed by the purchaser in the presence of a Commissioner for Oaths, who is not an advocate and solicitor practising in partnership with, or as the employee of, the advocate and solicitor acting for the housing developer.*

CONTRACT: *Agreement – Sale and purchase agreement – Purchase of properties with strata titles – Sole purchaser of two units in development phase – Whether title not commercially viable – Developer delivered properties with individual titles – Whether revocation of first set of sale and purchase agreements ('SPAs') agreed to by purchaser – Whether purchaser knowingly entered into second set of SPAs – Whether developer obtained purchaser's signature on documents by fraud – Whether purchaser's use of second set of agreements for financing purposes defeated challenge against validity of documents – Whether purchaser approbating and reprobating*

LEGAL PROFESSION: *Duty to client – Conveyancing – Solicitor acted as transactional solicitor for sale and purchase agreements and financing – Whether certificates issued pursuant to s. 84(1) of Legal Profession Act 1976 ('LPA') signed before Commissioner for Oaths – Whether sale and purchase agreement scrutinised by advocate and solicitor – Whether solicitor failed to adhere to requirements under LPA – Whether may be liable to disciplinary proceedings – Legal Profession Act 1976, s. 84(1) & (6)*

The plaintiff bought three units of property pursuant to three sets of SPAs ('first set of SPAs') in the Schedule H format prescribed by the Housing Development (Control and Licensing) Regulations 1989 ('1989 Regulations') all dated 23 April 2014, and which were to come with strata titles. As it turned out, the defendant delivered the two units of property under dispute herein, *ie*, Lots 197 and 207 ('two lots') to the plaintiff with individual titles instead of with strata titles. The reason, as asserted by the defendant was,

inter alia, because only the plaintiff had purchased the two units of properties for that particular phase. The defendant's management was concerned that it would not be commercially viable for both the plaintiff and the defendant if this phase, which was to house the two lots, was to be delivered with common facilities and service. Following discussions between one Mr Ye LangHeng ('Ye LangHeng'), the defendant's former Deputy Director of Sales and Marketing Department, and the plaintiff, the plaintiff had with full knowledge, agreed and executed, *inter alia*, deeds of revocation to revoke the first set of SPAs and entered into a second set of sale and purchase agreements ('second set of SPAs') in Schedule G format and which were backdated to 30 August 2014 for the two lots ('second set of agreements') before the transactional solicitor, DW1. A third unit, Lot 320, purchased by the plaintiff was under a different phase of the development. The SPA for Lot 320 was put under the name of the plaintiff's nominee and transacted under the prescribed statutory Schedule H form. However, when the plaintiff had the name of his nominee transaction changed to his name, it was done at the same time as the alleged execution of the second set of agreements for the two lots. The plaintiff asserted that in the course of him executing documents for the change in name for Lot 320, he was made to sign many blank documents, which formed his platform for his alternative cause of action that these documents were used to make up the second set of agreements to defraud him. In the financial documents to finance the purchase of the two lots, the second set of SPAs were named as the security with the plaintiff assigning his rights under the two lots to Bank of China (Malaysia) Bhd ('BOC') together with the plaintiff giving a power of attorney over the two lots to BOC. The two titles to the land for the two lots were in due course converted into individual landed titles with houses constructed thereon, and with a private swimming pool constructed on Lot 207 at the defendant's costs. The vacant possession of the houses were delivered to the plaintiff under the cover of letter dated 1 August 2017. This was disputed by the plaintiff who refused to accept delivery of vacant possession because the properties sought to be delivered did not come with strata titles with common property and common facilities to be managed under the Strata Management Act 2013 ('SMA'). Hence, in these actions, the plaintiff sought specific performance of the stratified development with common property.

Held (dismissing suits with costs):

(1) While the plaintiff claimed that the defendant had forged his signatures on the second set of agreements, the signatures were that of the plaintiff. There was a glaring inconsistent position taken by the plaintiff, in that, he enjoyed and was still enjoying the financing obtained from BOC premised upon the second set of the SPAs but wanted them to be declared invalid. As the second SPAs were the ones required by the

1989 Regulations to be reduced into the form of a prescribed format, no evidence shall be admitted for the purposes of contradicting its terms. However, s. 92(a) of the Evidence Act 1950 provides, *inter alia*, that any fact may be proved which would invalidate any document such as fraud or that it is wrongly dated. With the plaintiff challenging the second set of agreements, including the second set of SPAs, on grounds of fraud and that they were backdated to perpetrate a fraud upon him, evidence to prove the same could be admitted. (paras 21, 23, 26, 29-31)

(2) The second set of agreements were found in the first common bundle of documents and were classified as Part C documents, which meant that the documents were disputed as to both its authenticity and contents. If a document is disputed as to its authenticity, the document will have to be first admitted and the burden lies upon the party who wishes to assert that it is authentic by having the same tendered and its maker called or to satisfy the court as to why secondary evidence of the same can be relied upon to have the same admitted. The second set of agreements ought to have the authenticity of the disputed agreements separately proved, admitted and marked as exhibits. This was not done, and they remained as part C documents. Nevertheless, the court was prepared to admit the documents, in particular, the second set of SPAs and the deed of revocation for the two lots. (paras 32, 35, 36, 39 & 40)

(3) The solicitor for the sale and purchase transaction and the loan transaction was the same, namely DW1. DW1 was the transactional solicitor attending to the plaintiff in his financing transactions. In the two certificates referred to by DW1, signed by the plaintiff for Lot 207 and Lot 197, the plaintiff acknowledged that the law firm of Messrs Ajmer Sandhu & Ong was not acting for him as the purchaser and that he consented to them preparing the SPA. DW1 was a partner of this law firm. However, the two certificates were not signed before a Commissioner for Oaths and, by reason of s. 84(2) of the Legal Profession Act 1976 ('LPA'), they were not valid. Further, pursuant to s. 84(1) of the LPA, a statutory obligation was cast upon DW1 who was acting for the defendant, a developer, to ensure that any SPA drawn up by her was scrutinised by an advocate and solicitor. This was not done. The seriousness in which this obligation has to be met, could be seen in s. 84(6) of the LPA where the defaulting advocate and solicitor may be liable to disciplinary proceedings. (para 41)

(4) Having found that the plaintiff was the only person who had bought two units in that development, it was not commercially viable for the defendant to proceed with the development as a stratified development with the plaintiff ending up as being the only person to bear all the

maintenance charges for the common property and facilities of this development, as provided under the SMA. This led to discussions conducted by Ye LangHeng on behalf of the defendant, and which resulted in the plaintiff agreeing for the development to be converted from a stratified one to one with individual titles. This agreement was documented in a letter agreed to by the plaintiff. (paras 46 & 47)

(5) There was no suppression of evidence by the defendant in not listing Ye LangHeng in any of its lists of witnesses. The identity of the witness, who had met up with the plaintiff for the discussions leading up to the agreement for the variation, was known to the plaintiff. The plaintiff was thus at liberty to have Ye LangHeng produced by subpoena. (para 48)

(6) In consideration for the agreement, the defendant was to construct a swimming pool within Lot 207 at the defendant's costs and to carry out renovation works to suit the plaintiff at the plaintiff's costs. The defendant did complete the construction of the houses, built the swimming pool in Lot 207, had the titles converted and vacant possession of the houses were delivered to the plaintiff under cover of letter of 1 August 2017. The plaintiff's refusal to accept the same did not detract from the fact that the defendant had performed its end of the bargain. Thus, the plaintiff was clearly approbating and reprobating or, in common parlance, blowing hot and cold. On the one hand, he (unilaterally) agreed for the common property meant to serve the stratified development he had bought into to be amended but, on the other, sought to continue to seek specific performance of the self-same stratified development with the common property carrying features such as the common swimming pool. (paras 49, 50 & 54)

Case(s) referred to:

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Lee Loy & Ors v. Poh Kam Sang & Anor [2017] CLJU 2023; [2017] 1 LNS 2023 CA ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Loke Kooi Chuan Properties Sdn Bhd v. Lee Kwee Foh Sdn Bhd & Ors [2022] CLJU 1942; [2022] 1 LNS 1942 HC ***(refd)***

Saujana Resort (M) Bhd v. Chin Cheen Foh & Ors And Another Appeal [2021] 3 CLJ 71 CA ***(refd)***

UMW Toyota Motor Sdn Bhd & Anor v. Allan Chong Teck Khin & Anor [2021] 5 CLJ 193 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 61, 63(b), (e), 65(1)(a)(i), 66(b), 73(1), 73A, 92(a), 101, 114(g)

Housing Development (Control and Licensing) Regulations 1989, Schedule G, H

Legal Profession Act 1976, ss. 84(1), (2), (6), 94(2)

Rules of Court 2012, O. 15 r. 6(1), O. 34 r. 2(2)(e)(i), (ii)

For the plaintiff - Wong Xin Yan; M/s David Gurupatham & Koay
For the defendant - John Aloysius Skekchy & Ban Qiao Hui; M/s James Monteiro

Reported by S Barathi

JUDGMENT

Su Tiang Joo J:

> It behoves an advocate and solicitor acting for a housing developer to ensure that any certificate signed by a purchaser saying he does not intend to engage an advocate and solicitor to scrutinise the agreement for him is signed by the purchaser in the presence of a Commissioner for Oaths who is not an advocate and solicitor practising in partnership with, or as the employee of, the advocate and solicitor acting for the housing developer.

Introduction

[1] This is the grounds of judgment for two actions commenced by the plaintiff which were heard together, and dismissed with costs after a full trial. Each action is premised upon the plaintiff seeking specific performance of a sale and purchase agreement wherein he had purchased what was to be a unit of stratified property to be managed under the Strata Management Act 2013 but was instead delivered a unit of property with an individual title.

Salient Facts

[2] The plaintiff bought three units of property pursuant to three sets of SPAs (collectively referred to as the "first set of SPAs") in the Schedule H format prescribed by the Housing Development (Control and Licensing) Regulations 1989, all dated 23 April 2014, and which were to come with strata titles. For the two units under dispute, one unit of housing accommodation was to be as per design model G192 for Lot 207 and the other as per design model G202 for Lot 197.

[3] As it turned out, the defendant delivered the two units of property under dispute, which are Lots 197 and 207 ("the two lots"), to the plaintiff with individual titles instead of with strata titles (agreed fact).

[4] The defendant asserted *inter alia*, that this is because it was only the plaintiff who had purchased the two units of properties for that particular phase of its development (see evidence-in-chief of DW2 in DWS2 para. 23 encl. 104). DW2 is the Regional Head of Sales and Marketing Department of Country Garden Malaysia and Singapore.

[5] DW2 testified (in para. 23 of DWS2) that the defendant's management was concerned that it would not be commercially viable for both the plaintiff and the defendant if this phase, which is to house the two lots, were to be

A delivered with common facilities and service. In the case of the plaintiff, it would lead to the plaintiff ending up being the only person to bear the costs for the maintenance and management of all the common property and common facilities. Evidence in one of the documents made mentioned that the maintenance of the proposed common swimming pool alone could have
B come up to RM60,000 per month.

[6] The defendant further asserted that following discussions by its former Deputy Director of Sales and Marketing Department, one Mr Ye LangHeng, with the plaintiff, the plaintiff had with full knowledge, agreed and executed, *inter alia*, deeds of revocation to revoke the first set of SPAs and entered into
C a second set of sale and purchase agreements ("second set of SPAs") in Schedule G format and which were backdated to 30 August 2014 for the two lots, (collectively referred to as the "second set of agreements") before the transactional solicitor, DW1. Reliance was placed upon a letter from the defendant to the plaintiff (IDB 1 p. 143, in Mandarin with an English version
D translated by a court interpreter (IDB10 p. 3).

[7] A third unit, which is not under dispute, purchased by the plaintiff is Lot 320, which is under a different phase of the development. The SPA for Lot 320 was put under the name of the plaintiff's nominee and transacted under the prescribed statutory Schedule H form. However, when the plaintiff
E had the name of his nominee transaction changed to his name, it was done at the same time as the alleged execution of the second set of agreements for the two lots. The plaintiff asserted that in the course of him executing documents for the change in name for Lot 320, he was made to sign many blank documents which, as will be mentioned later, formed his platform for
F his alternative cause of action that these documents were used to make up the second set of agreements to defraud him.

[8] In the financial documents to finance the purchase of the two lots, the second set of SPAs were named as the security with the plaintiff assigning his rights under the two lots to Bank of China (Malaysia) Bhd ("BOC")
G together with the plaintiff giving a power of attorney over the two lots to BOC.

[9] The two titles to the land for the two lots were in due course converted into individual landed titles with houses constructed thereon, and with a private swimming pool constructed on Lot 207 at the defendant's costs.

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[10] The defendant asserted that vacant possession of the houses were delivered to the plaintiff under cover of letter dated 1 August 2017. This is disputed by the plaintiff, who asserted that he refused to accept delivery of vacant possession because the properties sought to be delivered did not come
I with strata titles with common property and common facilities to be managed under the Strata Management Act 2013.

The Plaintiff's Claims

[11] The plaintiff claims he was defrauded.

[12] By purchasing a property in a stratified development, he would, *inter alia*, enjoy common property and facilities, and would have the right to on-sell any of the properties to foreign citizens or permanent residents or foreign companies. The plaintiff would not be able to do so with landed properties carrying individual titles. The plaintiff referred to and relied upon the provisions of the Circular of the Director General Land and Mines No. 1/2014, and in particular, para. 3.2.1 issued by the Selangor State Government, which allows properties to be sold to foreign citizens or permanent residents, which have a minimum value of RM2 million for properties in zones 1 and 2 and RM1 million for properties in zone 3. However, these properties are limited to those which are stratified. These provisions came into force on 1 September 2014 *ie*, only two days after the second set of SPAs were dated *ie*, 30 August 2014. The provisions state:

> 3.2 Syarat-Syarat Permohonan
>
> 3.2.1 Kategori tanah yang dibenarkan berdasarkan Syarat Nyata Tanah adalah seperti berikut:
>
> i. Bangunan Kediaman
>
> (a) Paras harga minima adalah RM2,000,000.00 bagi hartanah di Zon 1 dan 2 serta RM1,000,000.00 bagi hartanah di Zon 3.
>
> (b) Hartanah adalah terhad pada jenis Strata termasuk 'Landed Strata' sahaja.
>
> ii. Bangunan perniagaan
>
> (a) Paras harga minima RM3,000,000.00 bagi hartanah di Zon 1, 2 dan 3.
>
> iii. Industri/Perusahaan
>
> (a) Paras harga minima RM3,000,000.00 bagi hartanah di Zon 1, 2 dan 3.
>
> (b) Hartanah yang mempunyai Sekatan Kepentingan Sahaja perlu mendapat kelulusan daripada Pihak Berkuasa Negeri.
>
> (c) Penerima hendaklah mempunyai Lesen Pengilang daripada Kementerian Perdagangan Antarabangsa dan Industri (MITI) bagi Syarikat perkilangan milik asing.

[13] The plaintiff brought two actions against the defendant. One is WA-22NCVC-255-04-2019 ("Suit 255" for Lot 207) and another is WA-22NCVC-259-04-2019 ("Suit 259" for Lot 197) both collectively referred to as the "two suits".

[14] The plaintiff seeks a declaration that the second set of agreements are invalid, for an order of specific performance of the first set of SPAs, damages to be assessed *in lieu* of specific performance, special damages made up largely of the statutory prescribed liquidated damages for late delivery of the two lots computed based upon the first set of SPAs, costs on a solicitor-client basis and such further or other reliefs as this Honourable Court may deem fit or just.

[15] Due to the commonality of issues, the two suits were heard together and this decision is for the two suits.

The Plaintiff's Grounds For His Claims

[16] The plaintiff pleaded (in E108 pp. 42 to 45) and asserted (witness statement in E87 marked as PWS1) that:

(i) he had no knowledge of the second set of SPAs (para. 26);

(ii) the second set of agreements are false documents;

(iii) with him being in China at the material time of August 2014, it was impossible for him to have executed the second set of agreements which were dated 30 August 2014. He only came to know of the second set of agreements on or around 29 November 2017;

(iv) the defendant had forged his signatures in the second set of agreements. The plaintiff was categorical that he had never signed them;

(v) alternatively, even if the signatures on the second set of agreements are his, the plaintiff asserted that he ought not to be bound by them. He asserted that the second set of agreements were reconstructed with the defendant swapping pages of documents he had signed as part of a fraud upon him to convert his purchase under a Schedule H format to that under a Schedule G format. He asserted that this came about when, upon his return from China to Malaysia, he had visited the transactional solicitor (DW1) on 13 November 2015 to have the name of the purchaser in the SPA transaction for Lot 320 changed from his nominee's name to his name. Whilst there, he said that he was made to sign many documents which were blank documents which he alleged were then used to reconstruct the second set of agreements. I observed that Lot 320 was a stratified parcel purchased using the prescribed Schedule H format which did not give rise to any dispute save that this transaction was mentioned to give context to the plaintiff's claims;

(vi) the plaintiff pointed out that it was impossible for the second SPAs under the Schedule G format to be dated 30 August 2014 because the approval for the amended planning permission for the units of property in landed title form came about two years after the second set of agreements were said to be executed;

(vii) to underscore his assertion, the plaintiff said that he had secured approval from his financier, BOC, for the two lots on 23 July 2015 (PWS1; E87), which was before he was made to sign many of the alleged documents in blank on 13 November 2015. This financing was for the first set of SPAs;

(viii) upon query by this court for clarification, both the plaintiff and the defendant could only point to one letter of offer each from BOC, which is both dated 23 July 2015 (IDB 1 encl. 45 pp. 127 and 263 in Suit 255 and replicated for Suit 259 for Lot 207) to finance the purchase of the two lots.

Core Issue

[17] The core issue is whether the second set of agreements are valid and binding on the plaintiff, as the defendant asserted that if they are so, the plaintiff's two suits would fail. If they came about by a fraud perpetrated upon the plaintiff, they ought to be declared invalid.

Parties' Submissions

[18] Comprehensive written primary submissions and submissions in reply were put up by learned counsel for both the plaintiff and the defendant for the two suits. This was supplemented with closing oral submissions presented on 26 January 2024. I acknowledge the valiant efforts, which I am sure were done with the undoubtedly helpful contributions made by their able learned juniors and which have assisted me in my deliberations.

Court Analysis And Decision

[19] In determining the core issue, the following is my decision on the following sub-issues.

Whether The Signatures Of The Plaintiff In The Second Set Of Agreements Are Forged

[20] From the evidence led, including I inspecting the impugned signatures pursuant to s. 73(1) of the Evidence Act 1950 ("EA"), which provides that:

> (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

[21] I agree with the defendant that the signatures on the second set of agreements are of the plaintiff. See *Loke Kooi Chuan Properties Sdn Bhd v. Lee Kwee Foh Sdn Bhd & Ors* [2022] CLJU 1942; [2022] 1 LNS 1942 paras. [23] and [24], where the learned Judicial Commissioner accepted the invitation of the defendant to inspect the impugned signatures pursuant to s. 73(1) of the EA. His Lordship said:

A [23] I acceded to the invitation of learned counsel for D1 to examine the signatures of Lee Nyan Chong appearing in the memoranda of transfers and the affidavits accepted by D1 to have been affirmed by Lee Nyan Chong. This, I can do premised upon the provisions of section 73(1) of the Evidence Act 1950 which provides that:

B > (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has
C > not been produced or proved for any other purpose.

In *Siaw Kim Seong v. Siew Swee Yin (f) & Anor* [2008] 5 CLJ 441; [2009] 1 MLJ 349 the Court of Appeal held at paras. 6 to 7:

> [6] ... But in this case you do not have to be an expert to see for yourself that the signature supposed to be of the plaintiff appearing
D > on the memorandum of transfer and the assignment do not match even upon a cursory visual examination. In fact, the signature said to be that of the plaintiff on the assignment is manifestly different from that appearing on the memorandum of transfer.
>
> [7] Had the judge undertaken such an examination he would have
E > concluded, even without the aid of an expert, that the signatures appearing on the assignment and the transfer were plain and undisguised forgeries ...

[22] In *Loke Kooi Chuan Properties Sdn Bhd* (*supra*), after undertaking a comparison, the learned Judicial Commissioner went on to make a finding
F that the signatures were similar.

[23] Although I have found that the signatures on the second set of agreements are genuine signatures of the plaintiff, this does not dispose of Suit 255 and Suit 259. This is because, as mentioned, the plaintiff posited an alternative cause of action grounded on fraud premised upon the
G transactional solicitor having placed or to use learned counsel's word, "swapped" documents carrying the plaintiff's genuine signatures to be placed in the second set of agreements, back-dating them and passing them off as having been agreed upon by the plaintiff, when the plaintiff did not.

Approbating And Reprobating Or Blowing Hot And Cold

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[24] In dealing with this alternative grounds advanced by the plaintiff to challenge the validity of the second set of agreements, there is one issue which troubled me. It is that the plaintiff had in fact relied upon the alleged false second SPAs for the two lots as security to obtain credit facilities from
I BOC (see the facilities documentation (encl. 45 pp. 50 to 83 @ 80 for Suit 255 and pp. 186 to 219 @ 216 for Suit 259).

[25] As at the date of the presentation of closing oral submissions on 26 January 2024, no application was made to have BOC added as a party to the two suits to address the consequences in the event the second set of agreements are declared invalid.

[26] With the plaintiff having and continuing to act on the premise that he had paid for the two lots in full using the financing obtained from BOC, which were drawn up with reliance placed upon the second set of SPAs, and with both parties further confirming that only one letter of offer dated 23 July 2015 for each of the two lots were relied upon, the plaintiff must be taken to have utilised the financing for the second set of agreements. Therefore, there is a glaring inconsistent position being taken by the plaintiff in that he enjoyed and is still enjoying the financing obtained premised upon the second set of SPAs but wants them declared invalid, but BOC is not a party to the two suits before this court. I had pointed this out to learned counsel for the plaintiff and the defendant on 26 January 2024 during the course of them presenting their oral submissions. Is the plaintiff blowing hot and cold or approbating and reprobating? If so, it is a position which the court would not countenance. See *Lee Loy & Ors v. Poh Kam Sang & Anor* [2017] CLJU 2023; [2017] 1 LNS 2023; [2018] 3 MLJ 240 at para. [39] that held:

> [39] We further agree with the submissions of learned counsel for the respondents that it is clear that the appellants are approbating and reprobating at the same time. While on the one hand the appellants are resisting the summary application and contesting that they are more than squatters who have a right to stay, they are on the other hand, applying to the court to compel the respondents to sell the subject land or be given time to move. In *Cheah Theam Kheang v. City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761, the Court of Appeal explained the principle of approbation and reprobation:
>
> > [105] We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath. On the one hand, he claims that the High Court order dated 16 July 2001 overrides or displaces a statute which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Pic v. News (UK) Ltd and Others* [1990] 3 All ER 376 at pp. 383-384:
> >
> > > There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[27] This inconsistent stand by the plaintiff sits heavily on my mind. I am aware that O. 15 r. 6(1) of the Rules of Court 2012 ("ROC"), expressly provides that:

> (1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

[28] However, it is also settled that all parties affected by a court order must be made parties to the suit, see *Saujana Resort (M) Bhd v. Chin Cheen Foh & Ors And Another Appeal* [2021] 3 CLJ 71 at para. [41] where the Court of Appeal held that:

> It is trite that in an application for a declaration, all parties who would potentially be affected by such an order must be before the court.

Whether The Plaintiff Can Challenge The Second Set Of Agreements

[29] The second SPAs are ones required by the Housing Development (Control and Licensing) Regulations 1989 to be reduced into the form of a prescribed format, and therefore no evidence shall be admitted for the purpose of contradicting its terms, see s. 92 of the EA, which states:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

[30] However, there is a proviso in s. 92(a) of the EA, which provides, *inter alia* that any fact may be proved which would invalidate any document, such as fraud or that it is wrongly dated. Section 92(a) is reproduced below:

> (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law.

[31] Wherefore, with the plaintiff challenging the second set of agreements, including the second set of SPAs, on the grounds of fraud and that they were backdated to perpetrate a fraud upon him, evidence to prove the same can be admitted.

Whether Fraud Has Been Proved

Burden Of Proof

[32] In the two suits, the plaintiff asserts that the second set of agreements are false documents. He seeks a declaration that the second set of agreements are invalid instruments. It is trite that he, who asserts must prove, see s. 101 of the EA, which provides:

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[33] Therefore, the burden clearly lies on the plaintiff. In this regard, the reliance by the plaintiff on the case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 for the principle that the burden and onus to prove that a sale is genuine is on the pursuer, that is, the party who asserts that the sale is genuine, is wholly misplaced because in *Letchumanan*, it was the plaintiff who was asserting that the sale is genuine. See para. [62]:

... The respondent had the burden to prove that Kalidas had authority to bind the appellants (see *Ardeshir Mama v. Floora Sassoon* AIR 1928 PC 208). It was not where judgment could be entered upon failure of the defence. For even if it were true that forgery was not proved, it remained that it must be first proved that the impugned PA was valid in order for judgment to be entered. The burden of proving that the SPA was binding rested with the pursuer (see *Ardeshir v. Flora Sasson* AIR 1928 PC 208 at 215). If the impugned PA were not valid, then the SPA could not bind the first appellant, that is, even if forgery were not proved.

[34] In the two suits before this court, it is the plaintiff who is asserting that the second set of agreements were brought about fraudulently, and therefore, it is clear that the legal burden lies upon him to prove his assertion and not the defendant. Whilst evidential burdens may shift, the legal burden that lies upon the plaintiff does not shift. See *UMW Toyota Motor Sdn Bhd & Anor v. Allan Chong Teck Khin & Anor* [2021] 5 CLJ 193 at para. [63] where the Court of Appeal said:

We consider it a well-established principle that a defendant is perfectly entitled to challenge the evidence of the plaintiff's expert witness by way of cross-examination without him having to call his own experts. In *Keruntum Sdn Bhd v. The Director Of Forests & Ors* [2017] 4 CLJ 676 at p. 698, Hasan Lah FCJ (speaking for the Federal Court) said:

> [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party ... When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of these different methods. See *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147; [1998] 1 MLJ 697.

[35] The second set of agreements are found in the first common bundle of documents (IDB1 encl. 44) and were classified as Part C documents (see IDB3 (see NOP p. 4 with the documents being in encl. 44 for Suit 255 and in encl. 42 for Suit 259). The consequence of the parties classifying them as Part C documents meant that the documents are disputed as to both authenticity and contents, see O. 34 r. 2(2)(e)(ii) of the ROC:

> (e) if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:
>
> (i) Part B – documents where the authenticity is not disputed but the contents are disputed;
>
> (ii) Part C – documents where the authenticity and contents are disputed.

[36] If a document is disputed as to its authenticity, the document will have to be first admitted, and the burden lies upon the party who wishes to assert that it is authentic by having the same tendered and its maker called, (see s. 73A of the EA) or to satisfy the court as to why secondary evidence of the same can be relied upon to have the same admitted. Section 73A of the EA is reproduced here:

> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either:
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
>
> (b) if the maker of the statement is called as a witness in the proceedings.

[37] During the course of the trial, the second set of agreements were referred to by DW1, who was the transactional solicitor, in her evidence-in-chief given in the form of a witness statement (encl. 101 para. 2.1 c), 8, Lot 207 – para. 9(b) and 9(c); Lot 197 – para. 9(b) and (c), para. 11.7). In summary, she said that she had met the plaintiff at her office on

13 November 2015, she explained the contents of the second set of agreements to the plaintiff, who proceeded to sign them, and she then affixed her signature on the same to confirm having witnessed the plaintiff executing them. DW1 then went on to say that:

> I also passed an Acknowledgment confirming that he executed the *inter alia*, aforementioned documents.

[38] DW1 then produced a copy of the acknowledgment by the plaintiff dated 13 November 2015 (marked as exh. DLB6 in encl. 101), which was later filed as an additional common BOD (encl. 107 marked as IDB10) classified as Part B documents, which meant that their authenticity is not disputed but the contents are disputed, see O. 34 r. 2(2)(e)(i) of the ROC. DW1 was cross-examined on it (see NOP p. 141 lines 25 to 4 and p. 142 lines 1 to 3746 and p. 143 line 1). In summary, DW1 says that the word in the manuscript saying "collected" meant her firm collected the first set of SPAs from the plaintiff after he had executed the second set of agreements.

[39] On the Part C documents, which were the second set of agreements, learned counsel for the defendant ought to have the authenticity of the disputed documents separately proved, admitted and marked as exhibits, especially the second set of agreements relied upon by them in their defence, with their originals produced and maker called, as is required by s. 73A of the EA. This was not done, and they remained as Part C documents. Even though, throughout the course of the trial, they have been referred to in detail, and identified by both learned counsels, unless and until they have been properly admitted in accordance with the evidential requirements, they remained as identified documents (ID), and generally their contents ought to be inadmissible.

[40] However, I am prepared to admit them, in particular, the second set of SPAs and the deed of revocation for the two lots for the following reasons:

(i) during cross-examination of the plaintiff, he admitted that the signature on the document entitled acknowledgment (exh. DLB6 IDB10 p. 22) saying that the signatures on the second set of agreements "should be" his (NOP p. 37 line 8);

(ii) as mentioned, my perusal of the disputed signatures pursuant to s. 73(1) of the EA led me to find that the signatures on the second set of SPAs are those of the plaintiff and thus subject to what I have to say below, the maker of the document has been produced in court;

(iii) there is documentary evidence in the form of two separate facilities agreement (IDB5; encl. 45 at p. 127 for Lot 207 and p. 220 for Lot 107) that show that the plaintiff had ostensibly utilised the second set of SPAs dated 30 August 2014 for purposes of securing facilities from the BOC (see IDB4 E45). The inference is that the originals would have been

handed over to his financier as is common conveyancing practice, more so, when one of the security documents is a deed of assignment of the alleged rights of the plaintiff in the SPA of 30 August 2014. Therefore, secondary evidence of the second set of SPAs can be led to prove them;

(iv) secondary evidence was in fact led. This is in the form of the photocopies produced in IDB3 (encl. 44), and the oral account of their contents given by the transactional solicitor, DW1, who has herself drawn them up and seen them, see ss. 61, 63(b) and (e), 65(1)(a)(i) of the EA, which is produced as follows:

> Section 61: The contents of documents may be proved either by primary or by secondary evidence.
>
> Section 63(b): Secondary evidence includes:
>
> ...
>
> (b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;
>
> Section 65(1)(a)(i): (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (a) when the original is shown or appears to be in the possession or power:
>
> (i) of the person against whom the document is sought to be proved;

and

(v) in my considered opinion, there is no necessity for a notice to be given to the plaintiff to produce the same as he ought to know that from the nature of the two suits filed by him, he will be required to produce it with him having relied upon them to secure financing, see proviso (b) of s. 66 of the EA:

> Secondary evidence of the contents of the documents referred to in section 65(1)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case:
>
> Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases or in any other case in which the court thinks fit to dispense with it:

...

(b) when from the nature of the case the adverse party must know that he will be required to produce it; ...

[41] I had said that the plaintiff had ostensibly utilised the second set of SPAs because:

(i) from the facilities agreement, DW1 was also the transactional solicitor for the financing. This is borne out by her attesting the signature of the plaintiff as the borrower in the facilities agreements; she had also attested the signature of the plaintiff as the assignor in the assignment agreement, and attested the signature of the plaintiff as the donor of each of the power of attorney for the two lots, all of which documents were to document the loan taken and the security given;

(ii) I understood the plaintiff in his evidence-in-chief given in the form of his witness statement (PWS1 at Q&A 20) as saying that the solicitor for the sale and purchase transaction and the loan transaction were the same, namely DW1, and he was not cross-examined on this and this supports the fact that DW1 was the transactional solicitor attending to the plaintiff in his financing transactions;

(iii) DW1 referred to two certificates (IDB10 encl. 107 pp. 7 and 8) that were said to have been signed by the plaintiff, one for Lot 207 and the other for Lot 197. In these two certificates, the plaintiff has signed an acknowledgment that the law firm of Messrs Ajmer Sandhu & Ong, Advocates & Solicitors (now known as Messrs Kean Yau & Dang, see para. 19 of DWS2 encl. 104) is not acting for him as the purchaser and that he consents to them preparing the SPA. DW1 is a partner of this law firm. These two certificates carry a title as having been issued pursuant to s. 84(1) of the Legal Profession Act 1976 ("LPA"). However, s. 84 of the LPA expressly provides that:

> (1) Where an advocate and solicitor acts for a housing developer in a sale of immovable property developed under a housing development neither he nor any member or assistant of the firm of which he is a member either as partner or employee shall in the same transaction act for the purchaser of that property, and a written agreement prepared by an advocate and solicitor or any member or assistant of the firm acting for the developer in respect of such transaction shall be scrutinised by an advocate and solicitor acting for the purchaser:
>
> *Provided that if any such written agreement in respect of the transaction is not scrutinised by an advocate and solicitor acting for the purchaser, the advocate and solicitor acting for the housing developer shall obtain a certificate signed by the purchaser showing that purchaser does not intend to engage an advocate and solicitor to scrutinise the agreement for him.*

A *(2) For the purpose of this section a certificate shall not be valid unless it is signed by the Purchaser in the presence of a Commissioner for Oaths who is not an advocate and solicitor practising in partnership with, or as the employee of, the advocate and solicitor acting for the housing developer.*

(3) The developer and the purchaser shall each pay for the fees of its own advocate and solicitor.

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(4) In subsection (1):

(a) the term "housing development" has the meaning assigned to it in the Housing Developers (Control and Licensing) Act 1966; and

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(b) "sale of immovable property" includes the grant of a lease for a term exceeding three years.

(5) Subsection (1) is without prejudice to any law affecting an advocate and solicitor who acts for parties where there is a conflict of interest or whenever a conflict of interest may arise.

D

(6) An advocate and solicitor who acts in contravention of subsection (1) may be liable to disciplinary proceedings. (emphasis added)

(iv) a perusal of the two certificates relied upon by DW1 shows that they were not signed before a Commissioner for Oaths and by reason of s. 84(2) of the LPA, they are not valid. Instead, pursuant to s. 84(1) of the LPA, a statutory obligation is cast upon DW1, who is acting for the defendant, a developer to ensure that any SPA drawn up by her is scrutinised by an advocate and solicitor. This was not done. The seriousness in which this obligation has to be met, can be seen in s. 84(6) of the LPA, where the defaulting advocate and solicitor may be liable to disciplinary proceedings. If found guilty of misconduct, the advocate and solicitor shall be liable to one or more of the following penalties or punishments: (a) to be struck off the Roll; (b) to be suspended from practice for any period not exceeding five years; (c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or (d) to be reprimanded or censured, see s. 94(2) of the LPA;

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(v) it cannot be gainsaid that if the provisions of s. 84(1) of the LPA had been scrupulously followed, it is probable that the two suits now before this court would not be in the court's docket;

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(vi) the answer elicited by learned counsel for the defendant when cross-examining the plaintiff that no one stopped him from getting his own lawyers (NOP p. 56 lines 35 to 47) carries no value, and does little to countenance the clear contravention of the provisions housed in s. 84 (1) of the LPA. In fact, the plaintiff went on to say that when the documents were passed to him, there were pages with a "cross (x)" on them, and that when he was asked to sign at these places, he did. It is clear that he did not sign the s. 84 certificate before a Commissioner

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for Oaths as is statutorily required by s. 84(2) of the LPA. Therefore, the perfunctory and careless attention in attending to this statutory requirement designed to safeguard the interest of the purchaser meant that the two certificates have no probative value. For the defendant to seek to justify such an omission by asserting that no one stopped the plaintiff from seeking the services of an advocate and solicitor is adding insult to injury, and aggravates the harm that may be suffered by the plaintiff and does little, if at all, to address the mischief or potential harm that this statutory provision seeks to avoid;

(vii) the plaintiff testified that his loan for Lots 207 and 197 was approved on 23 July 2015 (E87 PWS1 Q&A 18 para. 3). This piece of critical evidence is corroborated by the facilities agreement for Lot 207 at p. 127 (IDB5) and for Lot 197 at p. 263 (IDB5). Although the date at p. 127 is rather blurry, the date of "23 July 2015" can be clearly seen in p. 263 (IDB5). With both transactions having indisputably taken place at the same time, I am of the considered view that BOC had approved the loans for the two lots on 23 July 2015. This was further confirmed by counsel for both the plaintiff and defendant that these two letters of offer, each dated 23 July 2015, were the only letters of offer from BOC for the financing of the two lots; and

(viii) when learned counsel for the defendant cross-examined the plaintiff vigorously, and put to the plaintiff that the loans taken by the plaintiff must be for the second SPAs of 30 August 2014 (see NOP 50 to 55), the plaintiff disagreed. However, his denial has no probative value because it is confirmed by learned counsel for both the plaintiff and defendant that there is only one letter of offer by BOC per lot, and the loan documentation provides that it is the second set of SPAs that form the security for the financing given by BOC and which is being enjoyed by the plaintiff.

[42] As at 13 November 2015, when the plaintiff met with DW1 to execute the second set of agreements, the plaintiff asserted that another critical event has taken place. The Selangor State Authority had issued a circular (encl. 46 pp. 2 to 22) ("the said circular") stating that with effect from 1 September 2014, foreigners such as the plaintiff can only purchase stratified properties with a minimum value of RM1 million. This meant that the plaintiff could not buy landed properties as they do not come with strata titles.

[43] Much time and effort was taken by learned counsel for the plaintiff in both his written and oral submissions, to assert that the defendant's ultimate purpose in putting up the second set of agreements was to circumvent the effect of this circular. In his written submissions (encl. 120 paras. 58 and 59), learned counsel submitted:

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> 58. The Defendant, in (*sic*) cognisant of the circular prohibiting the Plaintiff from having, transfer and/or sell (*sic*) property with Individual Title, had unilaterally back-dated the date of the 2nd SPA to precede the circular's effective date, effectively flouting the circulars (*sic*).
>
> 59. Thus, the Defendant by instructing his solicitors in (*sic*) masterminding and engineered such an exercise even to the extent to produce the impugned 2nd SPA and DOR by swapping pages and date or stamp meticulously to ensure the circular is circumvented.

B

[44] However, with respect, I asked myself, what would the defendant gain from seeking to cause the plaintiff to be unable to effect dealings of the two lots with foreign nationals, permanent residents or foreign nationals in the State of Selangor?

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[45] The purchase price for Lot 207 is RM5,354,888, whereas the purchase price for Lot 197 is RM3,622,688. The prices for each lot far exceed the threshold for dealings if the property comes with a strata title, and if the two lots have stratified titles, the plaintiff would be able to deal with them. In my considered view, it does not make sense for the defendant to deliberately prohibit the plaintiff from dealing with the two lots.

D

[46] Instead, I find the answers given by DW2 (DWS2 – para. 21) to be probable *ie*, having found that the plaintiff was the only person who had bought two units in that development, it was not commercially viable for the defendant to proceed with the development as a stratified development with the plaintiff ending up as being the only person to bear all the maintenance charges for the common property and facilities of this development, as provided under the Strata Management Act.

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[47] This led to discussions said to be conducted by one Mr Ye LangHeng on behalf of the defendant, and which resulted in the plaintiff agreeing for the development to be converted from a stratified one to one with individual titles (DWS – 2 para. 27). This agreement was documented in a letter. This letter (IDB1 p. 143 (Mandarin version) was put to the plaintiff, who agreed that it carried his signature and thus, the inference is that he had agreed to it. The translated version of this letter in English can be found in IDB10 p. 3.

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Non-calling Of Ye LangHeng

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[48] The plaintiff called upon this court to draw an adverse inference pursuant to s. 114(g) of the EA against the defendant for failing to produce Ye LangHeng as a witness, the person who was said to have discussed with the plaintiff the variation of the development from one of stratified development to one carrying individual titles. I declined for the following reasons:

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(i) the assertion by DW2 is supported by a letter documenting the major change with a swimming pool to be constructed in Lot 207 and this letter carries the signature of the plaintiff;

(ii) that the plaintiff's agreement to the variation was conceded by the plaintiff as can be seen in the plaintiff's written submissions (encl. 120 para. 16) that the defendant's representative one Mr Ye LangHeng, has met and obtained the plaintiff's agreement on 25 October 2014;

(iii) therefore, the identity of the person, Ye LangHeng, said to have met up with the plaintiff for the discussions leading up to the agreement for the variation is known to the plaintiff; and

(iv) the defendant had not listed Mr Ye LangHeng in any of its lists of witnesses (encl. 82 filed on 29 December 2021, encl. 92 filed on 15 September 2023 and encl. 105 filed on 11 October 2023), and in my considered view, there has been no suppression of evidence by the defendant. This is because the plaintiff was at liberty to have Mr Ye LangHeng produced by subpoena, if necessary, there being no property in a witness, see *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627, where it is by the Court of Appeal that:

> iv) He who alleges must prove such allegation and the onus is on the appellant to do so. See s. 103 of the Evidence Act, 1950. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered as firstly the respondent never raised such an allegation and secondly has denied even making one. For this very reason the adverse inference under s. 114(g) of the Evidence Act, 1950 relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s. 114(g) is invoked against the appellant.

(v) see also the article written by Justice Su Tiang Joo entitled "*Is There Any Property in a Witness: Can the Truth Be Owned By Any Party?*" and published in the Journal of the Malaysian Judiciary (July 2023 publication) carrying his analysis that there can be no property in a witness as the truth cannot be owned by any party.

A *Whether What Was Further Agreed Upon Was Carried Out*

[49] In consideration for the agreement, the defendant was to construct a swimming pool within Lot 207 at the defendant's costs and to carry out renovation works to suit the plaintiff at the plaintiff's costs (DWS2 para. 28).

B **[50]** In due course, the defendant did complete the construction of the houses, built the swimming pool in Lot 207, had the titles converted on 9 March 2016 (agreed fact no. 6) and vacant possessions of the houses were delivered to the plaintiff under cover of letter of 1 August 2017 (encl. 45 pp. 139 to 141). That the plaintiff refused to accept the same does not detract from the fact that the defendant did perform its end of the bargain.

C

Approbate And Reprobate

[51] The plaintiff insisted that it was only the common swimming pool which was to be converted into a private swimming pool, and the initial area allocated for the swimming pool was to be converted into a garden to be

D treated as common property to be shared by all in the stratified development which the plaintiff bought into. The plaintiff pointed out that in the agreement which he described as the "letter of consent", it is set out that "all other terms of the first SPA will be remained (*sic*) the same".

E **[52]** I find the plaintiff's construction of the agreement he had made with the defendant through Mr Ye LangHeng to be far-fetched. If accepted, it would mean that he was at liberty to decide how the common property was to be restructured by continuing to have his house and to have the proposed swimming pool removed as part of common property with a private pool to be built at the defendant's costs in Lot 207 only for his use.

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[53] This directly contradicts his assertion that all the other terms of the first SPA "remain the same" *ie*, that a stratified development remains but the common swimming pool meant for the entire stratified development is now without a swimming pool. The logical inference to be drawn is that the

G plaintiff is agreeable for parts of the common property to be carved out for his personal benefit *ie*, the swimming pool, and that the character of the common pool meant to serve the whole development to be changed to a park or garden.

[54] Thus, the plaintiff is clearly approbating and reprobating or in

H common parlance, blowing hot and cold. On the one hand, he (unilaterally) agrees for the common property meant to serve the stratified development he had bought into to be amended but, on the other, sought to continue to seek specific performance of the self-same stratified development with the common property carrying features such as the common swimming pool. The law does not countenance this. See *Loke Kooi Chuan Properties Sdn Bhd*

I *v. Lee Kwee Foh Sdn Bhd & Ors* [2022] CLJU 1942; [2022] 1 LNS 1942 para. [29] where the High Court held:

However, in my considered view, D1 cannot be allowed to succeed in its challenge that Lee Nyan Chong was not a true director of D1 because:

i) ...

ii) ...

iii) ...

iv) ...

v) ... for D1 to later assert that Lee Nyan Chong is not a director of D1 before a different forum is *to blow hot and cold.* It amounts to an abuse of process and D1 should not be allowed to approbate and reprobate. The law reports are replete with authorities for this principle. Her Ladyship, Mary Lim Thiam Suan JCA (now FCJ) in *Lee Loy & Ors v. Ors v. Poh Kam Sang & Anor* [2018] 3 MLJ 240; [2017] 1 LNS 2023 CA:

> [39] We further agree with the submissions of learned counsel for the respondents that it is clear that the appellants are approbating and reprobating at the same time. While on the one hand the appellants are resisting the summary application and contesting that they are more than squatters who have a right to stay, they are on the other hand, applying to the court to compel the respondents to sell the subject land or be given time to move. In *Cheah Theam Kheang v. City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 2 CLJ 16; [2012] 1 MLJ 761, the Court of Appeal explained the principle of approbation and reprobation:
>
> > [105] *We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath.* On the one hand, he claims that the High Court order dated 16 July 2001 overrides or displaces a statute which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v. News (UK) Ltd and Others* [1990] 3 All ER 376 at pp. 383-384:
> >
> > > *There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.*
> >
> > (emphasis added)

[55] As for not constructing a park, if at all, it is but a breach of a term of the fresh agreement, which sounds in damages.

[56] In the circumstances, with respect, in my considered view the assertion that the defendant had deliberately set out to circumvent the said circular is a red herring and devoid of merits.

[57] I also find that the plaintiff is blowing hot and cold in continuing to enjoy financing from BOC premised upon the loan documentation premised upon the second set of SPAs but wanting to have them declared unlawful.

[58] I also find that the plaintiff is conversant with property dealings in Malaysia. Under cross-examination he said that he had started a line of business in Malaysia in buying and building houses since 2013 (NOP p. 21 lines 23 to 30).

[59] In his closing submissions which was presented orally on 26 January 2024, the plaintiff submitted that if this court finds the second set of SPAs to be valid, learned counsel for the plaintiff sought for liquidated and ascertained damages for the delay in delivering possession of the two lots premised upon the second set of SPAs. However, this was not pleaded. In fact, the crux of the plaintiff's claim is that the second set of SPAs were to be declared invalid. Wherefore, this belated shot is bereft of any legs to stand on.

[60] DW1 was the transactional solicitor for both the SPAs and the financing. In the light of this court's findings, her conduct in attending to the transactions leaves much to be desired. This court will call upon the Registrar to have the notes of proceedings referred to the Bar Council for them to look into taking disciplinary proceedings against her.

Conclusion

[61] Wherefore, I dismiss the two suits with costs to the defendant. After hearing parties, I award costs of RM40,000 subject to allocatur per suit to be paid by the plaintiff to the defendant in each suit.